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No. 99-1730

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

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SILVIA H. GARCIA, *Petitioner*,

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PETITIONERS' REPLY BRIEF

Three petitions scheduled for the Court's September 25, 2000 Conference raise important questions regarding § 1997e's exhaustion requirement: this one, and the petitions in *Booth v. Churner*, No. 99-1964, and *Massey v. Hellman*, No. 99-1918. The important questions raised by these cases are:

> 1. Does § 1997e require prisoners to exhaust internal prison grievance processes that do not confer monetary awards before bringing actions solely for damages?
>
> 2. Does an inmate's allegation of excessive force amount to a claim "with respect to prison conditions" for which exhaustion is required under § 1997e?

Because these questions are exceptionally important, and because there is widespread disagreement in the circuits as to how they should be answered, the Court should seize this opportunity to resolve them. This case, however, may not be

the best vehicle through which to address the issues because its continued justiciability is ambiguous in light of recent developments in the trial court.[1] Instead of granting this petition, the Court should hold it and certify for review these questions in *Booth* and *Massey*.

These questions should be resolved this Term because the circuit decisions addressing them are hopelessly fractured, and the need for Court guidance is acute. Respondent's attempt in his opposition in this case to minimize the circuit disagreements by advancing hair-splitting distinctions in the conflicting opinions only underscores the confusion.

Respondent recognizes that on one side of the split are the circuits that excuse exhaustion. On this side, the Ninth and Tenth Circuits allow a prisoner suit to proceed, notwithstanding a failure to exhaust administrative remedies, when only damages are sought and prison remedies would not have provided a monetary award. *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000)[2]; *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997). But even on this side, respondent admits that there is confusion. Although one panel of the Fifth Circuit has concurred with the Ninth and Tenth Circuit, *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1988), another panel has expressed its disapproval of their holdings. *Wright v. Hollingsworth*, 201 F.3d 663, reh'g en banc granted, No. 99-40063, 2000 WL 1238921 (5th Cir. Aug. 31, 2000).

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1. On August 17, 2000, the district court dismissed this case on alternative grounds. Although to date no notice of appeal has been docketed, the case may not be final because the Ninth Circuit adopts a modified mailbox rule governing the filing of inmates' notices of appeal.

2. The inmate in *Rumbles* died while the petition for certiorari was pending in that case.

On the other side of the split are the circuits that require exhaustion. On this side, respondent accepts that the Third and Eleventh Circuits require exhaustion before an inmate may pursue a suit -- at least in cases in which the prisoner has brought claims for both damages and injunctive relief ("mixed cases") -- regardless of whether prison remedies would have provided a monetary award. *Nyhius v. Reno*, 204 F.3d 65, 67 (3d Cir. 2000); *Alexander v. Hawk*, 159 F.3d 1321, 1322-23 (11th Cir. 1998). But even within this group of cases, there is a disagreement. As respondent points out, the Third and Eleventh Circuits hold that § 1997e requires administrative exhaustion before *any* portion of a mixed case may proceed. *Nyhius*, 204 F.3d at 70; *Alexander*, 159 F.3d at 1325. In direct conflict, the Tenth Circuit holds that only the *injunctive relief* portion of a mixed case is stayed when there has been a failure to exhaust. *Miller v. Menghini*, 213 F.3d 1244, 1246 (10th Cir. 2000).

Also on this side of the split, Respondent concedes that the Sixth and Seventh Circuits require exhaustion even when damages are the only remedy sought and the prison remedies were incapable of providing a monetary award. *Massey v. Hellman*, 196 F.3d 727, 732 (7th Cir. 2000) (relying on *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999)); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999); *Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). He attempts to distinguish these decisions from those excusing exhaustion by arguing that these courts only insisted on exhaustion because the prisoner might have been able to obtain *some* kind of relief in the administrative process, even if not money.

But this is a false distinction that does nothing to minimize the circuit conflict. The Fifth, Ninth, and Tenth Circuits excuse exhaustion whenever the inmate seeks damages and money is unavailable in the prison grievance process, *regardless* of whether the inmate might have received some other kind of benefit by pursuing his administrative remedies.

Thus, even under respondent's own analyses of the circuit decisions, the conflict is irreconcilable.

Finally, and to add to the disparate approaches among the circuits, last month the Second Circuit split with the Third, Sixth, and Eleventh Circuits on whether allegations of excessive force constitute a claim "with respect to prison conditions" for which exhaustion is required under § 1997e at all. *Nussle v. Willette*, No. 99-0387, 2000 WL 1199957, *9 (2d Cir. Aug. 24, 2000); *Freeman v. Francis*, 196 F.3d at 643-44; *Booth v. Churner*, 206 F.3d 289, 293-98 (3rd Cir. 2000); *Higginbottom v. Carter*, No. 99-8055, 2000 WL 1179793, *1 (11th Cir. Aug. 21, 2000). Although the petitioner in *Booth* did not raise this precise issue in his petition, his case alleging claims of excessive force presents the Court with an excellent opportunity to address and resolve this conflict.

Whether § 1997e requires inmates to exhaust administrative remedies when they exclusively seek damages or allege excessive force are questions that are critically important to California, to the 37 states that have urged the Court to grant the petition in this case, to prison administrators in the Nation's thousands of prisons and jails, and to the lower appellate courts, which desperately need Court guidance. Because this case is no longer in the best posture for the Court to resolve these issues, the Court should hold this petition and certify for review these questions in *Booth* and *Massey*.

Dated: September 19, 2000.

Respectfully submitted,

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